



Comptroller General
of the United States

Washington, D.C. 20548

1159267

Decision

Matter of: Federal Express Corporation

File: B-261260.2

Date: July 26, 1995

DECISION

Federal Express Corporation (FedEx) protests the terms of amendment No. 0006 of request for proposal (RFP) No. F11626-95-R-0002, issued by the Department of the Air Force for international passenger, cargo and aeromedical airlift services for the Civil Reserve Air Fleet (CRAF).¹

We dismiss the protest as untimely filed.

The RFP, issued on February 22, 1995, contained a contract performance period of October 1, 1995 through September 30, 1996. The RFP contemplated award to all offerors that responded to the RFP and met minimum requirements; price was not an evaluation factor since the agency fixes the rates to be paid to the air carriers in a ratemaking process in exchange for the carrier's commitment of aircraft to the CRAF. In addition to offers from single carriers, the RFP permitted offerors to form joint venture teaming arrangements which had to be approved by the agency. The approved agreements then had to be submitted with the team's offer.

The RFP essentially required three distinct services. First, the RFP required peacetime airlift service (fixed requirements) which apply to particular fixed routes for which airlift services were sought (for example, Dover, Delaware to Frankfurt, Germany--weekly cargo route).² The

¹Briefly, CRAF is a military program that uses the commercial airlift resources of U.S. civil air carriers to support Department of Defense airlift requirements that exceed the capabilities of Air Force aircraft during emergencies. Under the program, carriers which commit cargo and passenger aircraft also share in Department of Defense peacetime business for cargo and passenger aircraft services.

²Through a set of calculations set forth in the RFP, the agency determines how much of fixed peacetime air lift
(continued...)

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second requirement was for expansion airlift service (also allocated to each offeror based on the calculated percentage of MV credits) which allows the agency to place orders with the carriers for unplanned airlift services; the carriers do not have to accept orders for expansion airlift service.³ The RFP's third requirement is for CRAF activation of specific aircraft by the agency for emergencies; the carriers must comply with such activation by the agency.

The initial closing date was April 10, 1995; FedEx was the lead member of a team that submitted a proposal on that date.⁴ The agency subsequently issued amendment No. 0005, dated April 21, which made changes to the evaluation criteria and "reopened [the] closing date [and] extended [it] to May 8, 1995." Revised teaming arrangements were due by May 2.⁵ The agency, on May 3, then issued amendment No. 0006, which stated, in relevant part, as follows:

"New carriers committing aircraft to the CRAF after the closing of the RFP may offer as an individual contractor, as a new teaming arrangement or as an addition to an existing teaming arrangement." (Emphasis supplied.)

²(...continued)

services to award to each offeror based on mobilization value (MV) credits assigned to the offeror that are, in turn, based on the particular aircraft the offeror commits to the various requirements of the CRAF. Each offeror, which is otherwise qualified and responsible, receives a percentage share of the fixed requirements based on the calculated percentage of these MV credits.

³An important feature of the allocation process for expansion airlift service is that the RFP contemplated and permitted carriers which did not respond to the RFP (for example, because a carrier had not been operating for 12 months before the closing date as required by the RFP) to subsequently commit aircraft to the CRAF after the RFP closing date, either as an individual contractor or as part of a new teaming arrangement.

⁴The protester states that all other offerors timely submitted proposals by the original closing date of April 10, 1995, and had also submitted required teaming arrangements by the earlier required date of March 27, 1995.

⁵The protester states that, in response to amendment No. 0005 and prior to the issuance of amendment No. 0006, all offerors signed and returned statements to the contracting officer as to whether they proposed any changes in their proposals or teaming arrangements.

The amendment did not further extend the revised closing date of May 8.

On May 4, two representatives of FedEx telephoned the contracting officer to express their displeasure with amendment No. 0006 because the portion of the amendment allowing a carrier to join an existing team would allegedly have a "negative [financial] impact" on FedEx's own team; the protester also stated that "[it] would have possibly changed [its] team arrangement or reevaluated [its] entire proposal if [it] had known of this before." The contracting officer told the FedEx representatives to put any allegation of "harm" to the team in writing. On May 5, a representative of FedEx called again to inquire as to when the agency needed FedEx's comments. The contracting officer told him that "since [a]mendment [No.] 0006 did not affect the award of the fixed requirements, there was no great hurry." FedEx filed an agency-level protest on May 8, one hour before the closing time of 4 p.m.⁶ Since the letter did not use the word "protest" and did not explain the "harm" suffered by FedEx, the contracting officer states that the "letter [did not give me any] reason to postpone the closing which had been scheduled" for 4 p.m., May 8. The contracting officer therefore did not postpone the scheduled closing date and time. Finally, the contracting officer did not respond to FedEx's agency-level protest until June 13. This protest with our Office was filed on June 27, following receipt of the contracting officer's June 13 letter.

In its protest, FedEx does not object to a new carrier participating after the RFP closing date in the expansion airlift service requirement of the RFP as an individual contractor or as a member of a new team. Rather, FedEx protests a new carrier participating in the expansion airlift service by joining as a member of an existing team arrangement as permitted by amendment No. 0006. According to the protester, allowing a new carrier into a teaming arrangement after contract award creates a "dilution in the business available to any offeror other than the team receiving the new carrier," and has a negative financial impact greater than that of a carrier coming into the program on its own.

The Air Force and the interested party have requested dismissal of this protest as untimely. We agree that the protest was untimely filed.

⁶While there is some dispute as to whether FedEx's May 8 letter constituted an agency-level protest, the agency here "does not contest that the [letter] was an actual agency-level protest."

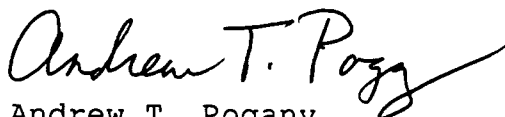
If a protest has been filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of formal notification of or constructive knowledge of initial adverse agency action, including the agency proceeding with receipt of proposals. See 4 C.F.R. §§ 21.0(f) and 21.2(a)(3) (1995). Here, the agency issued amendment No. 0005 on April 21, after the initial closing date of April 10, and thereby "reopened" and "extended" the closing date to May 8, permitting offerors to make changes and revisions to their proposals until the revised closing date and time.⁷ Since the offerors were given the opportunity to change their proposals by the terms of this amendment, we conclude that amendment No. 0005 effectively constituted a request for revised proposals by the extended closing date. Contrary to the protester's arguments, we think that, following the receipt of an agency-level protest, a contracting agency's receipt of proposals by a previously scheduled closing date, including the receipt of initial, revised, or best and final offers (BAFO), can constitute initial adverse agency action with respect to that agency-level protest. See Bollinger Mach. Shop & Shipyard, Inc., B-245702, Sept. 23, 1991, 91-2 CPD ¶ 269 (receipt of BAFOs constitutes initial adverse agency action). In short, we see no reason to distinguish between receipt of revised proposals and receipt of BAFOs for purposes of our initial adverse agency action rule.

As our Office has previously stated, we do not believe that filing an initial agency protest immediately before the deadline for receipt of proposals, as FedEx did, gives an agency a reasonable opportunity to act upon the protest except to either postpone the closing date or continue to accept proposals. In such circumstances, an agency's proceeding with the procurement without taking corrective action clearly constitutes initial adverse agency action. See Southwest Marine of San Francisco, Inc., --Recon., B-229654.2, Jan. 19, 1988, 88-1 CPD ¶ 49 (scheduled closing occurring less than 1 hour following filing of agency-level protest constitutes initial adverse agency action); Zapata Gulf Marine Corp., B-235249, July 27, 1989, 89-2 CPD ¶ 85. Thus, FedEx's protest to our Office is untimely because it was filed more than 10 days after FedEx knew or should have known that the agency proceeded with the receipt of revised proposals on the scheduled closing date despite the filing

⁷As stated above, revised teaming arrangements were due by May 2.

of its earlier agency-level protest. In this regard, the agency's June 13 letter to the protester in response to its agency-level protest is simply irrelevant.⁸

The protest is dismissed.



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⁸The protester argues that since the contracting officer did not consider FedEx's May 8 letter to be an agency-level protest, the agency's receipt of revised proposals was not adverse action because the agency did not recognize the letter to be a valid protest. The protester cannot have it both ways; if the May 8 letter was not an agency-level protest, this protest would be otherwise untimely. See 4 C.F.R. § 21.2(a)(1). Finally, the protester argues that the contracting officer continued to consider the original existing initial proposals which she had received before April 10. We find no relevance to this argument for purposes of the timeliness of this protest; we are aware of no requirement for the contracting agency to suspend all procurement activity after receiving an agency-level protest.